

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

SAM CHAN, )  
 )  
 Petitioner, ) CIV 11-00166 PHX PGR (MEA)  
 )  
 v. ) REPORT AND RECOMMENDATION  
 )  
 KATRINA KANE, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

TO THE HONORABLE PAUL G. ROSENBLATT:

Mr. Sam Chan ("Petitioner") filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 on January 25, 2011. Respondent filed a Response in Opposition to Petition for Writ of Habeas Corpus ("Response") (Doc. 8) on April 4, 2011. Petitioner filed a reply to the response on April 29, 2011. See Doc. 9. At the time Petitioner filed this action and his reply to the response to his petition he was confined in the Pinal County Jail.

## I Background

Petitioner is a native and citizen of Cambodia. In 1981 Petitioner was paroled into the United States as a refugee by the former Immigration and Naturalization Service (INS). Response, Exh. 1. In May of 1984 the INS adjusted Petitioner's status to that of a lawful permanent resident, pursuant to Section 209(a) of the Immigration and Naturalization Act (INA). Id., Exh. 1.

On October 22, 1996, the Municipal Court of California, Monteca County, convicted Petitioner of burglary, a felony, and sentenced him to 180 days incarceration. Id., Exh. 2. On April 25, 2001, the Superior Court of California, Stockton County, convicted Petitioner of theft, a felony, and sentenced him to ninety days incarceration. Id., Exh. 3. On April 25, 2001, the Superior Court of California, Stockton County, convicted Petitioner of battery, a felony, and sentenced him to three years of probation. Id., Exh. 4.

On November 13, 2001, the government issued a Notice to Appear (NTA), charging Petitioner as removable pursuant to section 237(a)(2)(A)(ii) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1227(a)(2)(A)(ii), as an alien who had been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct. The NTA also charged Petitioner was removable pursuant to section 237(a)(2)(E)(i) of the INA, codified at 8 U.S.C. § 1227(a)(2)(E)(i), as an alien who at any time after admission had been convicted of a crime of domestic violence. Id., Exh. 5.

1           On November 13, 2001, Petitioner was taken into the  
2 government's custody and held without bond. Id., Exh. 6.  
3 Petitioner requested a custody re-determination hearing. On  
4 November 29, 2001, the IJ held a hearing and denied a change in  
5 custody. Petitioner reserved his right to file an appeal, but  
6 failed to file one. Id., Exh. 7. On January 30, 2002, the IJ  
7 granted Petitioner's application for cancellation of removal  
8 under section 240A(a) of the INA. Petitioner and the government  
9 waived appeal. Id., Exh. 8.

10           On February 21, 2007, the Superior Court of California,  
11 Stockton County, convicted Petitioner of misdemeanor possession  
12 of methamphetamine and sentenced him to three years probation.  
13 Id., Exh. 9.

14           On March 25, 2010, the government issued a second NTA  
15 charging Petitioner as removable pursuant to section  
16 237(a)(2)(B)(i) of the INA, codified at 8 U.S.C. §  
17 1227(a)(2)(B)(i), as an alien who had been convicted of a  
18 violation of (or a conspiracy or an attempt to violate) any  
19 state law or regulation relating to a controlled substance.  
20 Id., Exh. 10. On March 25, 2010, the government took  
21 Petitioner into custody and held him without the opportunity for  
22 bond. Id., Exh. 11.

23           On May 5, 2010, an IJ ordered Petitioner removed to  
24 Cambodia. Petitioner and the government waived appeal. Id.,  
25 Exh. 12.

26           On November 9, 2010, the government served Petitioner  
27 with a Decision to Continue Detention. Id., Exh. 13. On May  
28 14, 2010, the government sent a travel document request to the

1 Royal Embassy of Cambodia, in order to effect Petitioner's  
2 removal from the United States. Id., Exh. 14. On September 16,  
3 2010, the Cambodian government interviewed Petitioner. Id.,  
4 Exh. 14. Respondents aver Petitioner is on the Cambodian  
5 approved travel document list and his travel document will be  
6 forthcoming. Id., Exh. 14.

7           Petitioner has been detained since March 25, 2010,  
8 approximately one year and two months. Petitioner's order of  
9 removal became final May 5, 2011, approximately one year ago.  
10 In the section 2241 petition Petitioner asserts that his  
11 continued detention pending his removal to Cambodia, for a time  
12 period beyond the statutory "removal period," violates his  
13 constitutional rights pursuant to the United States Supreme  
14 Court's opinion in Zadvydas v. Davis. Petitioner avers he has  
15 cooperated with efforts to remove him to Cambodia.

## 16           **II Analysis**

17           The Court may issue a writ of habeas corpus to a  
18 Department of Homeland Security detainee who is "in custody in  
19 violation of the Constitution or laws or treaties of the United  
20 States." 28 U.S.C. § 2241(c)(3) (2006 & Supp. 2010).

21           Federal law provides for the detention of removable  
22 aliens in two separate circumstances. Section 236(c) of the  
23 Immigration and Nationality Act ("INA"), codified at 8 U.S.C. §  
24 1226, governs the detention of aliens who are not under an  
25 administratively final order of removal. Section 231 of the  
26 INA, codified at 8 U.S.C. § 1231, governs the detention of  
27 aliens whose order of removal is administratively final.

1           Section 241(a)(1)(A) of the INA states that "[e]xcept  
2 as otherwise provided in this section, when an alien is ordered  
3 removed, the Attorney General shall remove the alien from the  
4 United States within a period of 90 days (in this section  
5 referred to as the 'removal period')." 8 U.S.C. § 1231(a)  
6 (1)(A). During the removal period, continued detention is  
7 required. See id. 1231(a)(2) ("During the removal period, the  
8 Attorney General shall detain the alien."). Under section  
9 241(a)(6), the Attorney General may detain an alien beyond the  
10 90-day removal period. See id. § 1231(a)(6).

11           In Zadvydas v. Davis, 533 U.S. 678, 121 S. Ct. 2491  
12 (2001), the Supreme Court considered whether the  
13 post-removal-period statute, INA § 241(a)(6), authorizes the  
14 government "to detain a removable alien indefinitely beyond the  
15 removal period or only for a period reasonably necessary to  
16 secure the alien's removal." 533 U.S. at 682. The petitioners  
17 in Zadvydas could not be removed because no country would accept  
18 them. Thus, removal was "no longer practically attainable," and  
19 the period of detention at issue was "indefinite" and  
20 "potentially permanent." Id. at 691. The Supreme Court held  
21 that INA § 241(a)(6), which permits detention of removable  
22 aliens beyond the 90-day removal period, does not permit  
23 "indefinite detention." Id. at 689-97. The Court explained that  
24 "once removal is no longer reasonably foreseeable, continued  
25 detention is no longer authorized by statute." Id. at 699.

26           The Supreme Court further held that detention remains  
27 presumptively valid for a period of six months. Id. at 701.  
28 After this six-month period, an alien is eligible for

1 conditional release upon demonstrating "good reason to believe  
2 that there is no significant likelihood of removal in the  
3 reasonably foreseeable future." Id. The burden then shifts to  
4 the government to respond with sufficient evidence to rebut that  
5 showing. Id. The six-month presumption "does not mean that  
6 every alien not removed must be released after six months. To  
7 the contrary, an alien may be held in confinement until it has  
8 been determined that there is no significant likelihood of  
9 removal in the reasonably foreseeable future." Id.

10 Because Petitioner waived appeal of the IJ's order of  
11 May 5, 2010, ordering him removed from the United States to  
12 Cambodia, the order of removal became administratively final on  
13 that day. See 8 U.S.C. § 1101(47)(B)(ii); 8 C.F.R. § 1241.1(b).  
14 The ninety-day "removal period", therefore, began on May 5,  
15 2010, the date his removal order became administratively final,  
16 and ended on or about August 5, 2010. See 8 U.S.C. §  
17 1231(a)(1)(B)(i) ("The removal period begins...[t]he date the  
18 order of removal becomes administratively final").

19 Thus, the presumptively reasonable six-month post-  
20 removal-period of detention expired on or about February 3,  
21 2011. Petitioner has now been detained for approximately three  
22 months beyond the time established by the Supreme Court as  
23 presumptively reasonable and the issue has become whether there  
24 is no significant likelihood of removal in the reasonably  
25 foreseeable future.

26 The burden of showing that there is no significant  
27 likelihood that a habeas petitioner will be removed in the  
28 reasonably foreseeable future rests with the petitioner seeking

1 relief. See Pelich v. INS, 329 F.3d 1057, 1059 (9th Cir. 2003).  
2 If the petitioner meets his burden, the government must then  
3 introduce evidence to refute that assertion. See id.; Lin Guo  
4 Xi v. INS, 298 F.3d 832, 839-40 (9th Cir. 2002). A petitioner  
5 may make such a showing by establishing that there is an  
6 "institutional barrier" to his repatriation, i.e., that the  
7 country of removal does not have an agreement with the United  
8 States to accept repatriation of its nationals. See Kim Ho Ma  
9 v. Ashcroft, 257 F.3d 1095, 1115 (9th Cir. 2001) (concluding  
10 that, because the United States had no functioning repatriation  
11 agreement with Cambodia, the designated country of removal, and  
12 because the Cambodian government did not accept the return of  
13 its nationals from the United States, there was no reasonable  
14 likelihood that the INS would be able to accomplish the  
15 petitioner's removal in the reasonably foreseeable future);  
16 Fahim v. Ashcroft, 227 F. Supp. 2d 1359, 1365 (N.D. Ga. 2002).  
17 Petitioner must demonstrate that "the circumstances of his  
18 status" or the existence of "particular barriers to his  
19 repatriation" to his country of origin are such that there is no  
20 significant likelihood of removal in the reasonably foreseeable  
21 future. Fahim, 227 F. Supp. 2d at 1366.

22 In reply to the response to his habeas petition,  
23 Petitioner states that the "Royal Embassy of Cambodia has  
24 recently informed Petitioner that it is 'not authorized to issue  
25 a new Cambodian passport and other travel document concerned.'"   
26 Doc. 9 at 3. Petitioner argues that, because he was placed on  
27 the "approved travel document list" at the latest on October 28,  
28 2010, his removal is per se not reasonably foreseeable because

1 over six months have passed since this event occurred.  
2 Petitioner contends that, notwithstanding the information  
3 received by Respondent from the Cambodian government, Cambodia  
4 has told Petitioner that it will not issue him a "new" Cambodian  
5 passport. Petitioner argues that, because the Cambodian  
6 government has refused to issue him travel documents, he has  
7 established evidence "sufficient for a showing of good reason as  
8 to why his removal is not likely in the reasonably foreseeable  
9 future." Id. at 5.

10 Petitioner has not established that his particular  
11 circumstances make it unlikely that he will be removed in the  
12 reasonably foreseeable future. Neither has Petitioner  
13 established that there are particular barriers to his  
14 repatriation, such as the lack of a state government to  
15 repatriate him, as is the case in Somalia, or that there is no  
16 governmental cooperation with Cambodia with regard to the  
17 repatriation of its citizens. Compare Thai v. Ashcroft, 366  
18 F.3d 790 (9th Cir. 2004) (granting Zadvydas claim based on lack  
19 of a repatriation agreement with Vietnam).<sup>1</sup>

20  
21 **IT IS THEREFORE RECOMMENDED** that Mr. Chan's Petition  
22 for Writ of Habeas Corpus be **denied**.

23  
24 This recommendation is not an order that is immediately  
25 appealable to the Ninth Circuit Court of Appeals. Any notice of  
26 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate

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28 <sup>1</sup> In 2002, Cambodia signed a repatriation agreement to accept  
deportees from the United States.

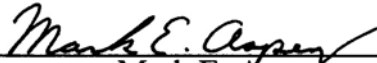


1 Procedure, should not be filed until entry of the district  
2 court's judgment.

3 Pursuant to Rule 72(b), Federal Rules of Civil  
4 Procedure, the parties shall have fourteen (14) days from the  
5 date of service of a copy of this recommendation within which to  
6 file specific written objections with the Court. Thereafter,  
7 the parties have fourteen (14) days within which to file a  
8 response to the objections. Pursuant to Rule 7.2, Local Rules  
9 of Civil Procedure for the United States District Court for the  
10 District of Arizona, objections to the Report and Recommendation  
11 may not exceed seventeen (17) pages in length.

12 Failure to timely file objections to any factual or  
13 legal determinations of the Magistrate Judge will be considered  
14 a waiver of a party's right to de novo appellate consideration  
15 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,  
16 1121 (9th Cir. 2003) (en banc). Failure to timely file  
17 objections to any factual or legal determinations of the  
18 Magistrate Judge will constitute a waiver of a party's right to  
19 appellate review of the findings of fact and conclusions of law  
20 in an order or judgment entered pursuant to the recommendation  
21 of the Magistrate Judge.

22 DATED this 4<sup>th</sup> day of May, 2011.

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24   
25 Mark E. Aspey  
26 United States Magistrate Judge  
27  
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